

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NEW YORK

11-01448 OTR MEDIA GROUP V. THE CITY OF NEW YORK

[1] ADJOURNED PRE-TRIAL CONFERENCE RE: COMPLAINT  
9 ADJOURNED FROM: 9/28/11, 10/25/11

10 ADJOURNED HEARING ON PROPOSED ORDER RE: [2] MOTION  
11 FOR PRELIMINARY INJUNCTION FILED BY PLAINTIFF,  
12 OTR MEDIA GROUP, INC.  
ADJOURNED FROM: 9/2/11, 9/12/11, 9/28/11,  
10/25/11, 11/22/11

13 [23] MOTION TO DECLARE THAT THE AUTOMATIC STAY  
14 DOES NOT APPLY OR IN THE ALTERNATIVE GRANTING  
THE CITY RELIEF FROM THE AUTOMATIC STAY

15 [ 16 ] ADJOURNED MOTION TO VACATE STIPULATION AND  
ORDER ENTERED 9/2/2011  
16 ADJOURNED FROM: 10/25/11/. 11/22/11

17 22-47385 OTR MEDIA GROUP, INC.

18 ADJOURNED [4] MOTION TO USE CASH COLLATERAL  
ADJOURNED FROM: 9/1/11, 9/28/11, 10/25/11, 11/22/11

20 ADJOURNED [6] MOTION TO PAY  
ADJOURNED FROM: 9/1/11, 9/19/11, 9/28/11,  
10/25/11, 11/22/11

22 [ 9 ] ADJOURNED STATUS CONFERENCE  
ADJOURNED FROM: 10/25/11, 11/22/11

23 HEARING (RE: RELATED DOCUMENT(S) [36] APPLICATION  
24 TO EMPLOY FILED BY DEBTOR, OTR MEDIA GROUP, INC.,  
25 [50] NOTICE OF SUBMISSION OF PROPOSED ORDER FILED  
BY DEBTOR, OTR MEDIA GROUP, INC., [55] OBJECTION  
FILED BY CREDITOR, CITY OF NEW YORK)

4 [ 51 ] APPLICATION TO EMPLOY VARIOUS PROFESSIONALS  
AS ATTORNEYS AND ACCOUNTANTS

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1                   THE CLERK: Numbers 49 through 57 on the calendar,  
2 all matters regarding OTR Media Group.

3                   THE COURT: Good afternoon.

4                   MR. KUSHNER: Good afternoon, your Honor. Gary  
5 Kushner, Goetz Fitzpatrick, counsel for the debtor.

6                   THE COURT: Thank you. Other appearances, please.

7                   MR. KLEINMAN: Alan Kleinman, New York City  
8 Corporation Counsel's Office, for the City of New York.

9                   THE COURT: Thank you.

10                  MR. DAVIS: Wayne Davis of Tannenbaum, Helpern  
11 Syracuse & Hirschtritt, on behalf of Metropolitan National  
12 Bank.

13                  THE COURT: Good to have you here, Mr. Davis.

14                  MR. CURTIN: Good afternoon, your Honor. William  
15 Curtin for the United States Trustee.

16                  THE COURT: And the same for Mr. Curtin.

17                  MR. DAL LAGO: Good afternoon, Mike Dal Lago for  
18 Morrison Cohen on behalf of Sakale Brothers.

19                  THE COURT: Yes. Thank you, Mr. Dal Lago.

20                  MR. SIMON: Scott Simon, Goetz Fitzpatrick, for OTR.

21                  THE COURT: Thank you, Mr. Simon.

22                  MR. HOLZER: Ariel Holzer on behalf of OTR.

23                  THE COURT: Okay. Thank you very much.

24                  Mr. Kushner.

1                   MR. KUSHNER: Yes, your Honor. I was handed a  
2 calendar, but if I may suggest to start with status first if  
3 that pleases the Court.

4                   THE COURT: That makes sense to me. Please proceed.

5                   MR. KUSHNER: It's number 55 on the calendar.

6                   THE COURT: Yes.

7                   MR. KUSHNER: I am not sure from the record the last  
8 time I was here on October 25th, but we did attend the Section  
9 341 hearing before the United States Trustee, and I'll let Mr.  
10 Curtin report to that. I think that we provided Mr. Curtin  
11 with substantially everything that was asked for at the IDI  
12 and that matter has now been carried for calendaring purposes  
13 only.

14                  The debtor has this morning filed operating reports,  
15 and I have an extra copy for the Court. If you need one I can  
16 approach if I may?

17                  THE COURT: Yes. You can pass that to my courtroom  
18 deputy, although I'm seeing -- is this number 59 on the docket  
19 filed this morning at 10:00 o'clock?

20                  MR. KUSHNER: I don't know the number.

21                  THE COURT: I have it. I have it.

22                  MR. KUSHNER: Do you want an extra copy?

23                  THE COURT: No. I think we're fine. I think we're  
24 fine, but thank you very much. Thank you for getting it on

1 time.

2 MR. KUSHNER: Just for the record, there was an  
3 operating report that was prepared and provided to the United  
4 States Trustee, but Michael Eisenberg, the controller of the  
5 debtor, prepared it on the forms applicable to small business  
6 Chapter 11's. It was really for discussion purposes only.  
7 Out of neglect it wasn't refiled in the proper form, but it's  
8 not as if we were silent with the information, so I wanted to  
9 clear that up.

10 THE COURT: Well, I'm glad that information flow is  
11 good.

12 MR. KUSHNER: The debtor has recently filed two  
13 motions which are returnable before your Honor on December  
14 15th. One is seeking an extension of exclusivity under  
15 1121(d), and then the second motion is a motion to extend the  
16 time for the debtor to assume or reject its leases for non-  
17 residential real property. That's also on for the 15th. You  
18 know, it's not before the Court today, but the general reasons  
19 for those motions is because the exit strategy still remains  
20 for the debtor to sell its signs. It is in the process of  
21 negotiating with several suitors who are very much interested  
22 in some of the more valuable locations, but we have not  
23 consummated a deal. This case is only approximately three  
24 months old, but those negotiations are going on daily. So but

1 we're just not in a process -- in a position to give the Court  
2 any concrete information as to a deal, and the debtor's  
3 operating profitably.

4                   The debtor is paying its expenses on time. Its  
5 taxing debts are being paid directly. The debtor is current,  
6 to the best of my knowledge, in the payment of the operating  
7 leases. It is able to, since the Chapter, continue its  
8 relationships with advertisers, and is generating substantial  
9 income ranging in the approximate nature of about \$400,000 per  
10 month.

11                  So for the moment I think that the Chapter 11 has  
12 been a good resource for the debtor. It's not been required  
13 until now perhaps to engage in litigations outside of  
14 Bankruptcy Court, and for the most part it's been  
15 concentrating on its business.

16                  THE COURT: There was some question about whether  
17 the debtor as entity was in good standing. Have you made any  
18 progress on that issue?

19                  MR. KUSHNER: The debtor is filing an application.  
20 Originally we were told before the bankruptcy filing that the  
21 debtor could not reinstate because of outstanding taxes that  
22 were due to New York State. I have since personally checked  
23 with Leo Mahon (ph.), the Attorney General -- the attorney at  
24 the New York Attorney General's Office who represents the

1 state. He has told me that the state has absolutely no tax  
2 claims against the debtor, and that the process of  
3 reinstatement has been -- I think it has been applied to.  
4 It's Albany. We have not received any confirmation that the  
5 reinstatement has been made, but it is no longer an obstacle  
6 that we have to pay those taxes as a condition for  
7 reinstatement.

8                   THE COURT: Okay. All right. I'm sure we'll be  
9 hearing from the city, and there are motions, matters on the  
10 Court's calendar that concern this issue as well, but with  
11 respect to the enforcement process, the prior and the ongoing  
12 efforts of the city with respect to compliance issues, could  
13 you tell me what the status of both those matters and any  
14 discussions may be?

15                   MR. KUSHNER: Addressing your Honor's last question,  
16 there has been little discussion with the city regarding a  
17 resolution, which has now taken the form of the motion that's  
18 before you today by the city to seek declaratory relief about  
19 the 362(d)(4) exception and/or alternatively relief from the  
20 automatic stay.

21                   We have not had any productive discussions about  
22 settling monetary claims since before the bankruptcy petition  
23 was filed, and regrettably so, but we have not had those  
24 discussions.

1           In terms of the actual proceedings that the debtor  
2 claims are stayed, the city has proceeded to continue  
3 notwithstanding what we believe to be the automatic stay, and  
4 we've staffed those hearings with counsel, in many instances  
5 getting adjournments and many instances having to go forward.  
6           There haven't been many, but we have attended to those. They  
7 have not been resolved with the city. I think ultimately the  
8 Court has to make a decision on the pending motion. Perhaps  
9 that will bring us closer to the negotiating table. We want  
10 to resolve the -- both the administrative and the economic  
11 issues with the city, and I assure you that we did make those  
12 attempts before the petition was filed, and I did try to reach  
13 out during the bankruptcy case, but so far those efforts have  
14 not been successful, your Honor, and I say that regrettably.

15           THE COURT: All right. Anything further on status?

16           MR. KUSHNER: On status, no.

17           THE COURT: Who else would like to be heard on  
18 status? Mr. Curtin, may I hear from you?

19           MR. CURTIN: Thank you, your Honor. William Curtin  
20 for the United States Trustee.

21           Your Honor, as your Honor is aware, we filed a  
22 letter on the docket last week in the context of one of the  
23 pending motions addressing the operating reports and the fact  
24 that they hadn't been filed, and we can address that motion,

1 so I'm happy to see that they were filed today, but  
2 unfortunately I was in Court all morning with Judge Feller so  
3 I haven't had an opportunity to review them in anywhere near  
4 the detail that I'd like to. So I really don't have much to  
5 report about the substance of those reports, but I'm glad that  
6 they actually were filed, and now that they have been we'll  
7 take another look at the ordinary course professional motion,  
8 and with regard to that motion, your Honor, we wouldn't object  
9 to as short an adjournment as the Court wants to give. Even  
10 two weeks or so would probably be sufficient.

11                   THE COURT: All right. Anything else from your  
12 standpoint?

13                   MR. CURTIN: No, your Honor. The meeting of  
14 creditors was held and the debtor provided the information  
15 that we requested. I would suspect we'll have additional  
16 questions based upon the operating reports, but I don't want  
17 to put the cart before the horse, so I'll take a look at them  
18 first.

19                   THE COURT: All right. From City of New York on  
20 status, anything?

21                   MR. KLEINMAN: No, your Honor.

22                   THE COURT: Okay. Anyone else like to be heard on  
23 the status of this case?

24                   All right. Let's move to what may be the most

1 significant matter we have to address today, which is the  
2 city's motion to declare that the automatic stay does not  
3 apply or in the alternative that the motion for relief from  
4 the automatic stay, and I do have an administrative question  
5 to ask in that context. The motion was filed in an adversary  
6 proceeding, and I understand as a purely administrative matter  
7 that there was a question of the need to make some kind of  
8 filing fee, something like that in connection with making a  
9 motion for relief from the automatic stay. Is it taken care  
10 of? I understand it's been -- has that been taken care of?

11 MR. KLEINMAN: Yes. Without resolving whether that  
12 was required or not we have paid the fee, and so that issue  
13 has been resolved.

14 THE COURT: I regret taking the parties' time with  
15 it, but I also understand it may be a component of having a  
16 motion before the Court in good order.

17 Well, this is the city's motion. It is made in the  
18 context of the adversary proceeding brought by the debtor  
19 against the City of New York, so Mr. Kleinman, let me hear  
20 from you.

21 MR. KLEINMAN: Thank you, your Honor. If I may  
22 approach, I have a table of what I understand to be the  
23 existing signs claim by the debtor. May I approach?

24 THE COURT: All right. Have you shown a copy to Mr.

1 Kushner?

2 MR. KLEINMAN: Yes. Everybody has a copy.

3 THE COURT: All right. And could you provide two  
4 copies to my deputy? She can hand them up. All right.

5 MR. KLEINMAN: So I just want to back up and correct  
6 Mr. Kushner's position or attitude with respect to the primary  
7 reason why I stand here. So as a lawyer for the City of New  
8 York my primary function here is to make sure that enforcement  
9 proceeds as specified by state and city law, and so what I  
10 have been trying to do is work on that.

11 My -- while I initially was involved in this matter  
12 in an effort to collect judgments against the debtor and the  
13 landlord indemnitees, my primary purpose at this point is to  
14 insure that the laws and statutes and procedures with respect  
15 to enforcement proceed, and that's why I'm here, and that's  
16 not a question of negotiating or bargaining, nor is it a  
17 question of negotiating or bargaining with respect to the  
18 status. There is -- it is not I, but it is the Department of  
19 Buildings which in the first instance has the power and  
20 authority to decide what signs are lawful and what signs are  
21 not, and then after that it is the Environmental Control Board  
22 which has the authority at hearings requested by the  
23 respondents of those violations to contest that, and then the  
24 Environmental Control Board makes decisions.

1                   So there's nothing to be done at this point with  
2 respect to what I consider the key question here, and that is  
3 does the debtor have lawful signs, and I guess I think I join  
4 the Court's concern that the question of whether these signs  
5 are lawful is in fact sort of the foundational question for  
6 this bankruptcy as to whether or not this debtor is run -- is  
7 operating a lawful business and whether they have assets.

8                   Just as a side note to that, the fact that the  
9 debtor may in fact be selling signs is a -- I think in some  
10 ways makes my position here seeking to enforce the city's laws  
11 is more problematic because what I certainly don't want to see  
12 happen is signs which are unlawful to be sold and then it  
13 becomes the function of the city government to start all over  
14 again with respect to procedures with a new sign owner. So --

15                  THE COURT: Well, it seems to me that the question  
16 that your motion poses is both bigger and smaller than whether  
17 particular signs are illegal or should be sold, and the  
18 question is really a Bankruptcy Code question and a process  
19 question. Does the automatic stay apply or is this kind of  
20 activity outside the boundaries of the automatic stay? To the  
21 extent and if it does apply should there be stay relief so  
22 that the parties may pursue their rights, whatever they are,  
23 in the appropriate fora, and setting aside those two questions  
24 how ever they come out, is this the kind of issue that for all

1 the reasons you argue in your brief the Court should simply on  
2 a permissive basis abstain from inserting itself because of  
3 all the reasons articulated in the cases, and they're well  
4 laid out in your briefs, and I'll say all the briefs on the  
5 issue have been excellent and very helpful to the Court and  
6 also very interesting to read. Should the Bankruptcy Court  
7 abstain, and I begin with the primary focus on those first two  
8 questions. Does the stay apply? To the extent it does,  
9 should there be stay relief so that the parties may go pursue  
10 their rights under the applicable law in the appropriate forum  
11 and understanding the importance of the reorganization effort  
12 here, should there be some outer boundary defined where either  
13 the stay does apply or the stay does apply and should not be  
14 lifted? That would be the second part of the question I  
15 think.

16 MR. KLEINMAN: Okay.

17 THE COURT: So separate from what would be  
18 determined in proceedings that I do not intend to conduct here  
19 with respect to legality, the question it seems to me, and  
20 it's well briefed by both sides, is is this -- is the  
21 enterprise -- is your primary focus representing City of New  
22 York as you do, is that regulatory and enforcement purposes  
23 you describe in your papers something that is outside the  
24 boundaries of the scope of the stay or that should be the

1 subject of stay relief?

2 MR. KLEINMAN: Well, I --

3 THE COURT: That's where I'd really like -- that's  
4 what I need to hear you on first and foremost.

5 MR. KLEINMAN: I guess I would like to hear from  
6 your Honor what more you would like? With respect to what we  
7 did on the motion and on the reply papers it seems to me  
8 overwhelmingly obvious that the city's enforcement of its sign  
9 -- of signs, sign regulation in the city is a police power.  
10 It is directly falls under the exception under the Bankruptcy  
11 Code, and it is completely permissible for it to go forward.

12 The debtor in its opposition papers cites two cases,  
13 one of which resoundingly the Consumer Benefits case,  
14 resoundingly tracks what the city said with respect to Supreme  
15 Court and Court of Appeals cases in the initial brief, and the  
16 only case which the debtor came up with is the Enron case  
17 where there was a, you know, many times defunct entity that  
18 was never going to do business again, which is quite the  
19 opposite here where this is an entity in a -- and are  
20 restructuring a Chapter 11, who intends to go on with the  
21 business and either, regardless of whether the intention is to  
22 go on with the business or sell the signs, the question of  
23 enforcement with respect to police powers its seems to me,  
24 your Honor, is completely obvious and non-controversial here.

1           So I don't know what else to add with respect to the  
2 briefs here. I think on the legal question I fail to see much  
3 of a legal issue with respect to that, and if your Honor has  
4 any questions I'm happy to answer them or if you'd like to  
5 hear from the debtor I'll reply to him.

6           THE COURT: You know, I was going to suggest exactly  
7 that. I think it may make sense because it is a -- there is a  
8 rather impressive amount of law that is marshalled in support  
9 of your position from courts including the Supreme Court of  
10 the United States. While it might not seem just looking at  
11 the phrase, "police power" that this is a question where the  
12 police are being sent in, there is nevertheless a -- seems to  
13 be a significant weight of authority that supports the city's  
14 position.

15           I do -- I have posed to myself the question, and  
16 I'll pose it to you in due course whether there is some  
17 appropriate step at the margin that needs to be taken to  
18 preserve the prospect of reorganization here in the context of  
19 bonding and things like that, but that's a question perhaps  
20 for a few minutes from now, not a question for now.

21           So I think it is appropriate to hear from Mr.  
22 Kushner.

23           Mr. Kushner, sometimes the law is very strongly in  
24 your favor and sometimes the law gives you a narrow and

1 winding path up a steep hill and I think that may be a bit  
2 what you face here, but I look forward to hearing from you as  
3 always.

4 MR. KUSHNER: I'll try, your Honor. First, just for  
5 the record, you should have as part of the record our  
6 affirmation of Ariel Holzer and an omnibus opposition written  
7 under -- on behalf of the debtor, and then yesterday after we  
8 received the reply from the City of New York I hand delivered  
9 to chambers a copy of the contest motion.

10 THE COURT: The briefs that were --

11 MR. KUSHNER: The actual motion itself. The city  
12 had made reference in its reply to a decision that was made by  
13 Judge Peck --

14 THE COURT: Yes.

15 MR. KUSHNER: -- in the Southern District.

16 THE COURT: I have the briefs.

17 MR. KUSHNER: So I know your Honor has in the past  
18 been two steps ahead of most of the lawyers and has looked at  
19 various pleadings, so I provided them to you with the purpose  
20 of not arguing a sur reply, but just so that you could have  
21 them and then make a record as to why that case really doesn't  
22 apply here.

23 THE COURT: I saw the briefs. I can't say I studied  
24 the -- studied them from yesterday with the care they deserve,

1 but I did see them, had a chance to spend time with them. I  
2 also that you provided a copy based on the cc in your cover  
3 letter to Mr. Kleinman, so but let me hear from you. I think  
4 you can focus your argument wherever you'd like, but be sure  
5 to address what seems to be pretty strong authority in this  
6 Circuit and elsewhere that this kind of an activity, the  
7 city's regulation of outdoor advertising signs is in the  
8 nature of a police power exercise, and therefore, within the  
9 exception to the automatic stay set forth in Section  
10 362(b)(4).

11 MR. KUSHNER: Well, there are cases dating back to  
12 the turn of the century that clearly state that the regulation  
13 of signs in New York City is an exercise of the city's police  
14 power, but those cases were not decided in the context of a  
15 bankruptcy case or in the context specifically of the Section  
16 362(d)(4) exception.

17 More recently, your Honor, there were two or three  
18 cases that we believe does lend some credible support under  
19 the law that there is an exception to the general rule that  
20 those types of activities fall within the police power.  
21 Obviously the Enron case is one and then secondarily there was  
22 some dicta that was contained in Judge Gonzalez's decision in  
23 the Cabrini Medical Center case where he believed that the  
24 court's function is to ask the question is whether the police

1 or regulatory power is actually being invoked here, and we  
2 submit to your Honor that in a large number of cases that they  
3 are not and that they do not for that reason, amplified by the  
4 dicta in the Enron case, fall outside of the general rule that  
5 there is a 362(b)(4) exception.

6 I'm going to ask the Court for some assistance for a  
7 moment because in reading the reply, your Honor, I'd like to  
8 have you look at paragraph 10 of Mr. Kleinman's declaration,  
9 which is submitted as a reply.

10 THE COURT: Yes.

11 MR. KUSHNER: And it seems to me that the statements  
12 made in that paragraph 10 and in the next paragraph 11 are  
13 narrowing what was originally filed in the motion to obtaining  
14 relief as to existing signs as opposed to anything else, and  
15 if that is the case the only one who could ask Mr. Kleinman  
16 that is that the city's position, it would save a lot of time  
17 for me to address whether or not the city has now narrowed its  
18 scope of the motion because it is only pursuing existing  
19 signs, and I can't ask that Court -- that question directly,  
20 so I would ask your Honor to ask that question of the city.

21 THE COURT: I appreciate the point. Did you have an  
22 opportunity to conference on any of these issues with Mr.  
23 Kleinman? I know we started pretty promptly, but the question  
24 is, Mr. Kleinman, you state in paragraph 10, "The city's

1 motion seeks a declaration that the city can proceed to issue  
2 notices of violation or NOV's, an act that can occur only with  
3 respect to existing signs and the adjudication of those  
4 signs."

5                   So the issuance and the adjudication with respect to  
6 existing signs I take it Mr. Kushner's inquiry or Mr.  
7 Kushner's suggestion is that the city's focus as for now is  
8 existing signs as opposed to signs that were up at some point  
9 in the past subject to some kind of procedure or proceeding  
10 and have been since taken down. That's the question.

11                  MR. KLEINMAN: Okay. So with respect to the  
12 conferencing question, there is e-mails and numerous  
13 conversations where I tried my best with Mr. Kushner --

14                  THE COURT: Understood.

15                  MR. KLEINMAN: -- to reach agreement with respect to  
16 anything going forward.

17                  THE COURT: You're both trying so hard that I'm  
18 actually quite prepared to give you a few minutes now to  
19 continue that once we finish this -- the laying out the  
20 framework of the issues as I see them in your papers and as I  
21 hear them from you, but what does the city want to do next  
22 week?

23                  MR. KLEINMAN: Okay.

24                  THE COURT: Or tomorrow?

1                   MR. KLEINMAN: So I chose my words carefully and the  
2 foremost issue, and it remains the foremost issue today, is to  
3 determine the legality of the existing signs. I think the  
4 motion can extend far beyond that and probably does so. I  
5 would happy today to leave this courtroom with that issue held  
6 in abeyance and simply to be able to move forward with respect  
7 to the existing signs.

8                   THE COURT: Mr. Kushner --

9                   MR. KLEINMAN: So that's the city's position.

10                  THE COURT: Mr. Kushner, this is a business that's  
11 trying to reorganize and you've indicated from the outset, and  
12 I have no reason to doubt that it is the business's desire to  
13 conduct a regular business and where necessary regularize its  
14 business in order to conduct a regular business. Why not have  
15 a procedure in place where the city can proceed to issue  
16 notices of violation in the event, hopefully unlikely, that  
17 there are any illegal signs still out there?

18                  MR. KUSHNER: Your Honor, I know that you've read  
19 our papers, and our papers do not in any way suggest that we  
20 wouldn't go forward with the remedial provisions that are set  
21 forth in state court, but we provided to you a comprehensive,  
22 at least from Mr. Holzer who's the expert on the regulatory  
23 matters --

24                  THE COURT: Yes.

1                   MR. KUSHNER: -- who's in Court today to answer your  
2 questions that there are two paths that can be taken by the  
3 city in order to quote "enforce their police powers as to  
4 these signs."

5                   THE COURT: Existing signs?

6                   MR. KUSHNER: Existing signs. So you know, just  
7 digressing just for a moment, if you took a look at Mr.  
8 Horan's affirmation or declaration in support of the motion --

9                   THE COURT: Yes.

10                  MR. KUSHNER: -- at paragraph 5 there's a statement  
11 that refers to 119 notices of violations on 18 identified  
12 signs. I'll let you -- let me know when you're ready.

13                  THE COURT: I have a marked-up copy as opposed to a  
14 clean copy of the papers. Let me get the right copy. So --

15                  MR. KUSHNER: Paragraph --

16                  THE COURT: -- in the moving papers?

17                  MR. KUSHNER: Paragraph 5. Horan declaration,  
18 paragraph 5.

19                  THE COURT: Yes.

20                  MR. KUSHNER: Okay. And our point was that was to  
21 13 of those signs there are NOV's, but there are no signs in  
22 existence. There is no lease between the debtor or any  
23 landlord. Those leases either were terminated or expired, and  
24 there is no prospect whatsoever for this debtor to continue

1 business. So the only purpose served by going forward with  
2 ECB proceedings is to get the amount of the fine that's  
3 associated with those NOV's.

4 That is pecuniary in nature. It will undermine the  
5 entire effort to reorganize because we're going to have to  
6 spend thousands and thousands of dollars defending those, and  
7 if we're talking about the fixing of a claim, this debtor  
8 should be given a chance in this Court to reorganize, and at  
9 that point in time it may be appropriate to have the ECB  
10 courts decide the amount of the violations, but not now. It  
11 only serves to require the debtor to spend more money  
12 unnecessarily to the detriment of every other creditor in this  
13 case.

14 The debtor can't afford to defend those proceedings  
15 because the bank is not going to allow unfettered use of cash  
16 collateral for those legal fees, and there's no purpose served  
17 except to fix the city's claims, and there is no position  
18 stated in the reply or anywhere else in the papers that  
19 disputes the fact, the contention that there are no signs to  
20 remediate, there are no signs to abate. There is no further  
21 risk to the public health or welfare and --

22 THE COURT: As to those?

23 MR. KUSHNER: As to those.

24 THE COURT: But it does seem --

1                   MR. KUSHNER: And as to those five that of the 18,  
2 your Honor, in our papers we have provided what the status of  
3 those hearings are, and let me just refer to --

4                   THE COURT: I think there is a distinction to be  
5 drawn between the practical appeal of your position, which is  
6 in substance that the debtor might not object and would  
7 appreciate the reasons that the city would wish to proceed  
8 unfettered by the stay in the context of existing signs where  
9 the debtor has a common interest in a lawful enterprise and  
10 maybe setting aside for the moment the question of how to  
11 proceed -- when and how to proceed with respect to the signs  
12 that have been taken down.

13                  Now, the city argues, and this is in paragraph 24  
14 and other places in Mr. Kleinman's reply declaration, that  
15 there's authority that supports the police and regulatory  
16 exception to the automatic stay applying to former signs,  
17 applying to the activities that you put in one category and  
18 they suggest maybe belong in another, and citing the M Corp.  
19 case, which I'm sure you studied, there is language to the  
20 effect from the Supreme Court that "Even if there were no  
21 evidence for the potential for ongoing harm, the bankruptcy  
22 proceeding is not the right forum for making that  
23 determination," and it goes on.

24                  MR. KUSHNER: Can I address that, your Honor?

1           THE COURT: What I'd like to -- what I'd like to  
2 understand better is the debtor's position as for today with  
3 respect to existing signs because I don't hear you disagreeing  
4 strenuously with the suggestion that -- whether it's because  
5 the stay doesn't apply or stay relief is appropriate based on  
6 cause, the city should be able to continue to protect the  
7 public health and safety through the police and regulatory  
8 power with respect to existing signs.

9           MR. KUSHNER: Here's the debtor's position, your  
10 Honor. On existing signs I think that the case law that you  
11 just cited in paragraph 24 and others, including Consumer  
12 Health and the Cabrini case say that there is a 362(d)(4)  
13 exception, and the stay does not apply.

14           As to signs that have already been removed without  
15 chance of having the ability to recreate them, have leases at  
16 those locations, I think that the decisions in Enron, and to  
17 the extent the Cabrini Medical Hospital case have carved out a  
18 narrow exception, and that is that where the police powers are  
19 not designed to stop and prevent existing violations then the  
20 police power exception to the automatic stay applies.

21           If there is no chance to stop and prevent, then the  
22 Enron exception applies, and it's our position that it would  
23 apply to the non-existing signs.

24           THE COURT: So when the Supreme Court says, "The

1 regulatory and police powers exception is not limited to  
2 situations in which future harm must be stopped. It includes  
3 actions to fix the amount of damages for past conduct, whether  
4 or not the conduct is continuing," citing a bankruptcy case or  
5 at least a case reported in the bankruptcy decision. If I'm  
6 reading and correctly recalling this, this is the Supreme  
7 Court M Corp. decision. That seems to be inconsistent with  
8 the exception to the exception that you described.

9           That being said, I pay close attention to Mr.  
10 Kleinman's statement that his priority representing his  
11 client, the City of New York, is to be able to proceed as  
12 promptly as possible, as the city may already be proceeding,  
13 with the unfettered ability to conduct the city's business,  
14 including its regulatory and police power business with  
15 respect to existing signs, and now I'll come back to our  
16 status conference, and I see separately the debtor's highest  
17 priority being to work toward a plan. You're asking me to  
18 extend exclusivity very soon, which means you're going to need  
19 to come show that you're making progress.

20           I wonder if the primary issue for the city and  
21 logically the primary concern is something that the parties  
22 can resolve or they can be adjudicated from the bench and in  
23 the absence of objection, with the other issues to be  
24 recognized by the parties as issues that must be dealt with

1 soon, consensually, or in adjudicative way, perhaps in the  
2 context of moving toward a plan, but I see this as you say, as  
3 two separate kinds of issues and also perhaps an opportunity  
4 for the city to get to work doing what it needs to do without  
5 concern of motion for a stay violation with an understanding  
6 that could be a predicate and a productive way to move forward  
7 with the debtor to work out all these other issues or frame  
8 them appropriately for this Court to decide or to send to  
9 another Court to decide if stay relief is appropriate.

10           Those struck me as the most important practical  
11 points, the needs and the management of the case that come top  
12 of the list and also I'll say with respect to the law and the  
13 questions I've been asked to decide as to existing signs, the  
14 area where perhaps the law is the clearest as you have  
15 acknowledged and I appreciate your candor. I think it's good  
16 lawyering.

17           So is there something there for the parties to  
18 discuss for a few minutes to see if there's a way to proceed  
19 consensually as to current signs?

20           MR. KLEINMAN: Your Honor, I think the remaining  
21 issue of the debtor is that the debtor has the choice to  
22 choose the administrative forum, and as to that the answer is  
23 no by statute. It's the Building Commissioner who has that  
24 authority and --

1           THE COURT: Do you mean with respect to existing  
2 signs or do you mean --

3           MR. KLEINMAN: No. Just --

4           THE COURT: -- with respect to past ones?

5           MR. KLEINMAN: I'm doing my foremost right now, and  
6 with respect to -- I think the only other issue that the  
7 debtor has, but Mr. Kushner can speak to that, is the argument  
8 in his opposition papers saying he would prefer a different  
9 administrative pathway, and as to that, as I explain in the  
10 reply papers, that is an issue which is committed to the sole  
11 discretion of the Building Commissioner and it's not to be  
12 second guessed by me or Mr. Kushner or the Court.

13           THE COURT: Your papers are both excellent and  
14 comprehensive, so I don't know precisely which point in your  
15 papers when you say the debtor -- I'm going to ask the same  
16 question again. I apologize for this. Is it with respect to  
17 existing or with respect to historical signs and violations?

18           MR. KLEINMAN: So your Honor, again today I would be  
19 very happy to leave the courtroom today with the full  
20 authority for the city to move forward with its statutory  
21 scheme for enforcement of the existing signs and to leave for  
22 another day the city's position, which is also the city's  
23 position that we would have the authority to move forward with  
24 respect to the down signs, but I'm happy pragmatically to just

1 hit the first issue today.

2 THE COURT: And my thought in that direction is that  
3 it permits the city to do what it needs most to do and should  
4 have as its highest priority it seems to me, and also permits  
5 the debtor to set aside that issue, know where it stands, but  
6 reserve its prerogatives with respect to other arguments.  
7 Each of you of course would reserve those and focus  
8 aspirationally together with its -- one of its major  
9 creditors, the city, to see if there's a way to make some  
10 progress on what's happened in the past whether in the context  
11 of your plan or some other way. That just seems to make an  
12 awful lot of sense to me.

13 Mr. Kushner, do you -- we don't need a break.

14 MR. KUSHNER: The debtor --

15 THE COURT: Maybe we're agreed on the record.

16 MR. KUSHNER: -- doesn't disagree. It's probably  
17 the one statement that Mr. Kleinman has made that I stand he  
18 agreeing with, that that's the practical approach, but there  
19 is an inherent problem with that approach, which I don't thi  
20 Mr. Kleinman articulated clearly. The -- not intentionally  
21 but because he's certainly capable of articulating clearly.

22 There are two proceedings by which the city can  
23 adjudicate these alleged violations of signs.

24 THE COURT: With respect to former signs?

1                   MR. KUSHNER: With respect to existing signs. All  
2 signs, but we're talking now in the universe of existing  
3 signs, which is what Mr. Kleinman is prepared to go forward  
4 with and so is the debtor, by the way, to go forward on  
5 existing signs. Under, and I tried to have this outlined in -  
6 - let's see if I can help you, in the Holzer affirmation  
7 beginning at paragraph 11, and it's quite a bit to read now,  
8 but what that -- those sections say is that there are the ECB  
9 avenues and what happens and there's the oath avenue.

10                  Under ECB there is an adjudication by an  
11 administrative judge, which almost --

12                  THE COURT: Yes.

13                  MR. KUSHNER: -- always the OAC, outdoor advertising  
14 company, loses and built into the process -- we accept that.  
15 Built into the process, however, is that in order to appeal  
16 that decision any further the final penalty that's imposed by  
17 that administrative law judge, the home team, you know,  
18 referee, if you will, has to be either paid or bonded in order  
19 to exercise an appellate. There is a procedure in place that  
20 would grant the OAC a hardship waiver of the right to or the  
21 obligation to post a bond or to pay the fine, and if the city  
22 is willing to provide us with that hardship waiver, obviously  
23 we're in a Bankruptcy Court and every precious nickel is  
24 precious.

1                   THE COURT: A Bankruptcy Court that is sometimes  
2 characterized as being more friendly to one side than another,  
3 a characterization that I reject categorically.

4                   MR. KUSHNER: I've never made that, your Honor.

5                   THE COURT: And I'm grateful to know that. I've  
6 never -- I do not think it's an appropriate characterization  
7 of any court of which I'm familiar.

8                   MR. KUSHNER: But I'm saying our funds are truly  
9 limited. They're even further limited by the big brother bank  
10 who has absolute say-so in use of cash collateral, and if the  
11 city's true purpose is remediation and to abate signs, then  
12 the monetary aspect that's associated with the privilege to  
13 appeal shouldn't be all that important to the city, and we  
14 would ask the Court to fashion relief from stay so that there  
15 is a hardship waiver as to those ECB hearings that go forward  
16 on existing signs. We've consented to it.

17                  If not, then we're prepared to go forward in a more  
18 we think streamlined process through the oath process, which  
19 also involves a preliminary oath hearing before, you know, a  
20 lower level type of tribunal, but the immediate right to  
21 appeal is just that. It's immediate and there are no  
22 conditions, and it allows us to go through the Article 78  
23 process a lot quicker.

24                  We think that either case where we can get a

1 hardship waiver or the city is directed to go forward with  
2 oath, we're not asking -- we're not asking to pick. We're  
3 just asking to be fair in the process that is picked so that  
4 we have a chance to fully adjudicate these issues at a level  
5 where our arguments fall upon ears that listen. At the lower  
6 levels at the ECB nobody listens to the outdoor sign company.

7 That's --

8 THE COURT: Mr. Kushner, though I have no knowledge  
9 and don't have an evidentiary record before me, I think we  
10 will make more progress in this hearing if we all assume, as I  
11 always assume, that parties, their counsel, witnesses,  
12 experts, judicial officers, judicial staff are proceeding in  
13 all good faith trying to do their best job every day. So that  
14 being said, I am concerned about the issue of needing to bond  
15 the appeal. I'm not stating it precisely, but you've  
16 described the point in your papers and you've just described  
17 it now.

18 I don't think it's, short of consent, I don't see a  
19 basis really to direct one path or another in the context of  
20 stay relief, including consensual stay relief, but I often see  
21 the situation, and you may well be familiar with this, I  
22 expect that experienced bankruptcy counsel certainly would be,  
23 where relief from the automatic stay or a finding that the  
24 stay does not apply and to the extent it does apply that

1 relief is appropriate up to the point -- up to a certain  
2 point, but not beyond or up to a point with the ability to  
3 come back to Court with -- when enforcement or bonding or  
4 something like that is triggered, something that could  
5 authentically interfere with what is a closely Court  
6 supervised reorganization process.

7           That's the kind of approach that it seems to me is  
8 warranted by the law, meets the needs identified by courts  
9 going back to the 1800's in some of the early cases, the  
10 earliest cases you cited about the trucks on Park Avenue with  
11 the signage. These are -- these are new issues and very old  
12 issues too. I think that kind of an approach makes sense. It  
13 seems to me quite important that the city have the ability to  
14 do its job, but also that the debtor consistent with that,  
15 which I think does have to come first, that the debtor have an  
16 opportunity to reorganize in a general way in Chapter 11. The  
17 debtor's prospect of reorganization is not only in the  
18 debtor's interest, in the debtor's principal's interest, but  
19 also in the creditor's interest. So it may be that the city's  
20 best opportunity to collect to proceed in its activities is in  
21 the context of a reorganized or reorganizing debtor, again in  
22 a closely supervised Court process whenever it's necessary to  
23 have a further hearing with respect to something like the bond  
24 with respect to an appeal. Now I'm looking at paragraph 24 of

1 the submission of Mr. Horan. Is that right?

2 So those are the lines along which I'm thinking.

3 Mr. Kleinman, can I hear from you about how  
4 something like this might meet the city's needs? I'm fully  
5 prepared to find in the record and ask the parties to submit  
6 an order and consent that consents to relief from the  
7 automatic stay to the extent that it applies to ECB or oath  
8 hearings with respect to current signs, and the language  
9 should be better than that, but -- because it's really more  
10 broadly the enforcement power that you've described in your  
11 papers and here on the record, but let me hear from you with  
12 respect to I think the fine tuning of this contemplated  
13 consensual relief that Mr. Kushner has described and Mr.  
14 Horan's papers describe and that you can probably tell I'm  
15 aiming toward.

16 MR. KLEINMAN: Well, your Honor, the -- in some ways  
17 the reason why OTR is here now is because there was a  
18 legislative judgment by the City Council that the penalties  
19 with respect specifically to signs were insufficient and the  
20 amount of penalty -- so the amount of penalties were increased  
21 for all sign companies operating signs that were not lawful as  
22 a matter of legislative decision, and it was specifically  
23 because the legislature did not want companies viewing small  
24 penalties as the cost of doing business, and so that's the

1 system that was set up, and similarly there were decisions  
2 made with respect to the procedure in front of the  
3 Environmental Control Board and appeals from the  
4 administrative law judge to the Board itself, and there are  
5 rules with respect to that, and those are decisions that are  
6 made and some of them apply very specifically in the context  
7 of signs, and I guess the issue of the other penalties that  
8 have been imposed here I think shed some light and some  
9 confirmation with respect to that legislative judgment that  
10 there are sign companies which have run businesses profitably  
11 until the higher penalties were invoked, and they see it as  
12 the cost of doing business.

13                   So it's not for me here to change the legislative  
14 scheme or the regulatory scheme with respect to how appeals  
15 get made. The standard is, and it's set forth in my reply  
16 papers, is fairly generous with respect to allowing hardship.

17                   I am told by the ECB that their practice is to do that  
18 generously, but I'm not here -- I don't have the authority to  
19 stand here and say we are going to automatically agree that  
20 they qualify for hardship.

21                   THE COURT: I understand.

22                   MR. KLEINMAN: As Mr. Kushner himself said, at this  
23 point without the prospect of having to pay any of the  
24 penalties owed to the City of New York the debtor is operating

1 quite -- at quite a profit, and I found it hard to read the  
2 operating report, but it seems to me if I read it correctly  
3 the nature of this business is the -- and I don't have the  
4 exact numbers in my head, but the amount of money that the  
5 debtor pays to the landlords for leasing the sites was  
6 something like \$130,000, whereas their revenue out of this was  
7 \$400,000. So their profit margin was approximately 300  
8 percent. I might be off 20 percent plus or minus.

9                   THE COURT: That would be assuming there were  
10 absolutely no other costs associated.

11                  MR. KLEINMAN: I understand that. I understand that  
12 but just in terms of the economics with respect to the cost of  
13 leasing the space and the revenue they get.

14                  THE COURT: 300 percent would be another 390, which  
15 would actually take us somewhere to the realm of 520. I think  
16 you may be off by about 100 percent, but it's a good profit.  
17 It appears to be that the cost of goods of sold, if you will,  
18 assuming that the sign costs nothing, at least their rent is a  
19 proportion of the revenue that suggests there may be a  
20 prospect for this business successfully to reorganize. I have  
21 to say that here that's a good thing.

22                  MR. KLEINMAN: Right. So I guess all I can say is  
23 that with respect to the issue as to whether this debtor at  
24 the point of an appeal that it chooses to take from a decision

1 of an administrative law judge which comports with due  
2 process, whether or not they meet the hardship requirement in  
3 the regulations is not to be prejudged or pre-guessed or pre-  
4 decided here.

5                   THE COURT: Mr. Kushner, I think the suggestion is  
6 that if the -- if it makes sense for the waiver that is  
7 described in section 3-73 of Title 48 of the Rules of the City  
8 of New York, emphasis added, for the waiver to be -- for a  
9 waiver to be applied, that in the discretion of the executive  
10 director as again the rules provide, that may happen. That  
11 seems to me that there should be a way to proceed.

12                  All of this is, of course, assuming there is a  
13 violation, there's a fine, and there's a desire to appeal in  
14 an ECB as opposed to an oath process. It seems to me that may  
15 well be a question for another day. I -- again, I find it  
16 hard to see how it doesn't make sense, focusing only on the  
17 existing signs, to come up with a way to proceed so the city  
18 can focus on its highest priority and the debtor can focus on  
19 its.

20                  I don't think you can get comfort with respect to  
21 the granting of a waiver application in response to losing a  
22 proceeding with respect to an unspecified sign, which  
23 proceeding has not been brought. I think that's just a little  
24 too far down the road.

1           So I mean if you'd like to confer with your co-  
2 counsel --

3           MR. KUSHNER: I would.

4           THE COURT: -- for a moment who is raising his hand.

5           MR. KUSHNER: May I?

6           THE COURT: Yes. Of course you may.

7           MR. KLEINMAN: Your Honor, let me just make one  
8 other suggestion. I mean I don't know the answer to this  
9 question, but to the extent the debtor's position is that the  
10 bankruptcy itself is evidence of hardship, they can brief that  
11 as part of their hardship application, and then it will be  
12 decided by the correct officer with respect to that decision.

13          So I don't think we need to make a decision about that right  
14 now, but --

15          THE COURT: It may well be in the papers, and  
16 perhaps counsel can inform me, but I'll ask the question  
17 anyway because I don't recall the answer. What is the time  
18 from the rendering of a decision?

19          MR. KLEINMAN: 20 days.

20          THE COURT: 20 days.

21          MR. KLEINMAN: And --

22          THE COURT: Do the -- so that could time sensitive.  
23 We could --

24          MR. KLEINMAN: And your Honor, there --

1           THE COURT: Does the time -- does the running of the  
2 time toll upon the making of an application for a waiver?

3           MR. KLEINMAN: Yes, it does, your Honor.

4           THE COURT: Okay. So 20 days of the mailing of the  
5 hearing officer's recommended decision is the time period for  
6 making the application for a waiver, and then you find out if  
7 you get the waiver.

8           MR. KUSHNER: Well, your Honor --

9           THE COURT: But your time to appeal doesn't expire.  
10 I take it it's tolled by the making of the waiver  
11 application.

12           MR. KUSHNER: Mr. Kleinman is respectfully telling  
13 you words that the City of New York generally -- generously  
14 grants waivers. There has not been one waiver granted to OTR,  
15 not one, in any of the cases that went through the ECB  
16 process. I can show you a handful of applications that were  
17 considered -- what? Or its landlords, and I'm afraid that by  
18 going through this process we're just going to wind up with a  
19 judgment that we cannot get to the proper court on an appeal  
20 that is going to undermine the reorganization.

21           Mr. Kleinman is the lawyer for the ECB.

22           MR. KLEINMAN: I'm not the lawyer for the ECB.

23           THE COURT: Lawyer for the City of -- he's one of  
24 the lawyers for the City of New York.

1                   MR. KLEINMAN: And the Environmental Control Board,  
2 your Honor --

3                   THE COURT: Not in a position to bind.

4                   MR. KLEINMAN: -- is an agency --

5                   THE COURT: He has a complex client.

6                   MR. KLEINMAN: Sorry. Is an agency which has its  
7 own statutory existence. It has its own counsel, and it makes  
8 decisions, and I don't tell them, and nor can I tell them how  
9 to decide things.

10                  THE COURT: And the decision maker, according to the  
11 rule that you have pointed me to, is --

12                  MR. KLEINMAN: The executive director of the --

13                  THE COURT: Is the executive director. All right.

14                  MR. KUSHNER: We're talking -- we're talking now,  
15 Judge, of -- may I?

16                  THE COURT: You should be near a microphone so we  
17 make a good record.

18                  MR. KUSHNER: Yes. About seven or eight signs, is  
19 that about right, that it's before ECB? I'm looking at your  
20 chart. Seven or eight signs. May I --

21                  THE COURT: Mr. Kushner, I'm not going to grant a  
22 waiver.

23                  MR. KUSHNER: No, no, no. I'm not --

24                  THE COURT: I can't waive.

1                   MR. KUSHNER: -- asking you to grant a --

2                   THE COURT: It's not my power.

3                   MR. KUSHNER: I'm not asking you to grant a waiver.

4 I was hoping that you suggest what you usually suggest, and  
5 that is to adjourn this for a few days, let Mr. Kleinman go  
6 back to his agency or to the ECB. We can stipulate this on a  
7 one-time basis as to an entity that's in bankruptcy. We can  
8 do it under seal so that it doesn't create a precedent, and we  
9 can move forward perhaps in that way.

10                  He has never said to this Court that he's asked the  
11 ECB for a hardship waiver.

12                  THE COURT: But a hardship waiver of what?

13                  MR. KUSHNER: The --

14                  THE COURT: There needs to be something to waive. I  
15 doubt it can -- I would not ask it to be determined in the  
16 abstract. If the parties wish to work something like that  
17 out, if you wish to have some agreement as to best efforts on  
18 expedited consideration, that's one thing, but I don't -- I  
19 don't -- I hear your argument and I hear your reasoning and I  
20 see the practical side of it. It seems to me that the debtor  
21 is wisely not disputing the exclusion from the stay of the  
22 police power and regulatory exception with respect to existing  
23 signs. Is that right, Mr. Kushner?

24                  MR. KUSHNER: We are not disputing that.

1                   THE COURT: So to that extent the motion's granted  
2 without opposition, and I can simply ask the city to submit an  
3 appropriate proposed order as a small portion -- that is a  
4 portion, maybe not a small portion, it doesn't matter. It's  
5 the most important portion of the relief the city's seeking.

6                   Are there any presently pending proceedings with  
7 respect to current signs?

8                   MR. KUSHNER: There are.

9                   THE COURT: And so --

10                  MR. KUSHNER: About seven or eight.

11                  THE COURT: There is the prospect that there could  
12 be a decision rendered that would lead to an application for a  
13 waiver which might or might not be granted, and at that point  
14 it seems to me it's appropriate first to try to resolve and  
15 then to come to Court on whatever basis you need to to  
16 conference those issues and see what can be done. At that  
17 point you are negotiation or arguing with respect to a  
18 specific appeal of a specific determination with respect to a  
19 particular sign and a known number.

20                  MR. KUSHNER: Your Honor --

21                  THE COURT: So that's -- that strikes me as a more  
22 logical path and a path that's more consistent with not giving  
23 advisory opinions or even suggesting, and I would defer to any  
24 party as to what they are able or not able to negotiate in the

1 concrete or in the abstract, trying to pursue something today.

2 I can see why you want it. That's a different question.

3 MR. KUSHNER: Well, your Honor, in the past you have  
4 fashioned stay relief with a number of conditions. You  
5 touched upon it earlier today where, for example, you allowed  
6 a proceeding to continue in another forum and had to report  
7 back. I'm afraid about the timing elements of this. If you  
8 have a decision that's made at the administrative level of the  
9 ECB and there is a determination made that there is a  
10 violation, then there's a hardship application made within the  
11 20-day period, okay, and if it's not granted, okay, you have  
12 ten days.

13 MR. HOLZER: Usually the letter says ten days to  
14 bond from -- the rejection letter usually says ten days to  
15 bond.

16 MR. KUSHNER: Would your Honor consider in the  
17 course of fashioning the procedure, not to interfere with the  
18 statute, but to enlarge the time so that at least we can bring  
19 the issue before you if the city doesn't consent? Otherwise  
20 we're going to be running here periodically on orders to show  
21 cause, and don't forget, this is a money judgment we're  
22 talking about. We're not talking about a removal or an  
23 abatement. We're talking about a money judgment, and to be  
24 required to pay what would be a pre-petition money judgment is

1 certainly not protected by the 362(d)(4) exception. What  
2 they're requiring us to do is to essentially pay a pre-  
3 petition claim as a condition for appealing. You understand  
4 my point?

5 THE COURT: I think I do. I have -- all right. Of  
6 course, the statutory scheme is what it is, and that was one  
7 of the points made earlier by counsel. I would like to take a  
8 -- I'd like to hear from anyone else who would like to add  
9 anything to the mix here, and then take a few moments to go  
10 over my notes, look at what we've previously seen in the  
11 parties' papers with respect to this particular statutory  
12 scheme, and perhaps give the parties an opportunity to try to  
13 work out something that may work even on an interim basis  
14 until out next status conference.

15 As to the other matters on the Court's calendar --  
16 go ahead.

17 MR. HOLZER: I'm sorry.

18 THE COURT: That's all right.

19 MR. HOLZER: I just want to -- I think it just bears  
20 repeating again that despite what assurances Mr. Kleinman may  
21 have been given by the ECB in terms of their procedure for  
22 allowing hardships, I have personal experience in terms of the  
23 filing of hardships and the rejections as previously stated.  
24 So far zero acceptances for OTR or any of its landlords in any

1 of the proceedings ongoing.

2                   Additionally, when hardships were originally sent  
3 out the practice of the ECB originally until we protested  
4 strenuously, was just to ignore that they've ever even been  
5 made, and to send us final judgments and bills. It's only  
6 recently when we protested and said "We filed hardships," we  
7 started getting in rejections. There has never been an  
8 acceptance. I think that has to be kept in mind just because  
9 there is a factual dispute here.

10                  THE COURT: All right. Well, I'm going to give you  
11 a few moments to confer with your co-counsel, confer with each  
12 other. I need a few moments to look back at some of the  
13 arguments that have been made and the rules and the procedures  
14 that you cite me to.

15                  I think the over-arching matter that is clear is  
16 that with respect to current signs the city needs to be able  
17 to proceed with respect to stay relief. It seems to me  
18 appropriate that it should at least on an interim basis be  
19 constructed in such a way that it interferes as little as  
20 possible with the debtor's prospect of reorganization,  
21 understanding that conducting the business in a lawful way is  
22 to my mind an aspect of the debtor's reorganization.

23                  So I'll give you a few minutes to think about that,  
24 confer on that. I'm going to do the same. We'll be back out

1 in just a few minutes. All right.

2 THE CLERK: All rise.

3 THE COURT: Thank you very much.

4 (Off the record/On the record)

5 THE CLERK: All rise.

6 THE COURT: Please be seated.

7 I spent some time looking at the rule that you've  
8 directed me to in your papers, and of course, Section 362 and  
9 the relevant subsection.

10 Let me hear from the parties. Mr. Kleinman, it's  
11 your motion. Is there anything you'd like to add to the  
12 record? Have the parties been able to reach an agreement on  
13 any path forward?

14 MR. KLEINMAN: No, your Honor.

15 THE COURT: All right.

16 MR. KLEINMAN: So I guess would request a ruling.

17 THE COURT: Mr. Kushner, anything to add?

18 MR. KUSHNER: No, your Honor.

19 THE COURT: All right. It seems to me that the  
20 record warrants, considering the issues raised by the motion  
21 and perhaps in stages, and that the issue that is appropriate  
22 for determination today on the basis of the papers and the  
23 record made before the Court is whether the -- whether  
24 pursuant to Section 362(d)(4) the automatic stay does not

1 apply to the city's exercise of its police and regulatory  
2 powers with respect to current signs operated or maintained by  
3 the debtor, including the process that's been referred to the  
4 notice of violation process, the Environmental Control Board  
5 or ECB process, and the OATH, Office of Administrative Trials  
6 and Hearings administrative process, and I'm satisfied and  
7 note that it appears the debtor does not contest that up to  
8 the point of enforcement and the police and regulatory powers  
9 in the direction of public safety and welfare the -- by  
10 operation of Section 362(d)(4) the automatic stay does not  
11 apply to the city's efforts in that regard.

12 I note that the exception to the application of the  
13 automatic stay that is created by Section 362(d)(4) is on its  
14 face and is interpreted by the cases and some leading  
15 commentators including Collier's 362(d)(4) exception to the  
16 application of the stay excludes actions to advance a  
17 pecuniary interest or to enforce a money judgment, and I'm  
18 prepared to find as for today that the relief most appropriate  
19 to be entered and that I will enter is with respect to that  
20 public safety and welfare component so clearly within the  
21 ambit of Section 362(d)(4), but not the economic pecuniary or  
22 money judgment enforcement component.

23 That is to say that it seems to me based on the  
24 record the city has not established or I am not yet persuaded

1 that the 362(d)(4) exception to the automatic stay excepts or  
2 carves out from the stay not only those proceedings, but also  
3 that which we have been focusing on most recently in this  
4 hearing, the requirement to bond or pay any fine in order to  
5 pursue an appeal.

6                   So my intention is to grant the motion in part and  
7 to enter an order finding that Section 362(d)(4) does carve  
8 out or except from the automatic stay those police and  
9 regulatory enterprises that I have described generally and  
10 will describe more precisely in the order, and I may ask the  
11 city to submit a proposed order to do as well as we can in  
12 describing in a useful way those activities.

13                  I think the question is a -- and I think that  
14 question is a close, and I note the debtor doesn't contest  
15 that conclusion in the law. I do think the question is far  
16 closer, and the balance may well tip in favor of the argument  
17 being advanced by the debtor as to whether the exclusion from  
18 the automatic stay stops short of permitting the city to  
19 expect or require if a waiver were not to be granted the  
20 posting of the bond or payment of the fine required by the  
21 rule in the absence of the waiver.

22                  I don't think I have the record before me today to  
23 direct a waiver in the abstract. I do think I have a record  
24 before me that warrants relief up to the point of the public

1 safety and welfare exception, but stopping short of the  
2 pecuniary interest and money judgment enforcement components  
3 of the city's activity, and for purposes of today in a  
4 conclusion that I may revisit it seems to me that the  
5 requirement to post a bond may well be in that category. That  
6 is to say that the stay exception doesn't go that far.

7 Now, because of the dynamics and the procedural  
8 posture in the hypothetical proceeding that has gone against  
9 the debtor from which the debtors wishes to pursue an appeal,  
10 how exactly that question, in effect the city's motion for  
11 relief from stay in order to collect the bond. Is that  
12 motion? I'm saying I think it may be.

13 I have to say I have not found precedent that  
14 informs that question with precision. I think the parties  
15 understand each other's positions. The parties have  
16 differing views of the likelihood of a waiver and the  
17 appropriateness of a waiver. The numbers we're -- and the  
18 debtor has every interest in its business being so successful  
19 that a hardship waiver would not be appropriate, but we don't  
20 know that yet. We aren't there yet. The debtor hasn't lost  
21 yet. We don't know what the amount is.

22 So I'm inclined, if I may, to go that far, to  
23 consider whether I should try to write this order myself or  
24 ask the parties to submit an appropriate proposed order which

1 I will then of course make my own with how ever many changes  
2 are appropriate, and to as always be available to the parties  
3 if there's something that needs to be addressed on a prompt  
4 basis because hypothetically speaking a determination is  
5 rendered, the waiver application is denied, and the debtor's  
6 time to appeal is coming up promptly because of the process  
7 that was chosen and the result that was obtained and the like,  
8 but I don't think I help either the city's efforts or the  
9 debtor's reorganization enterprise by trying to predict the  
10 future.

11 To that extent I am aware of and reading with care  
12 the decisions and the treatises that talk about the exceptions  
13 to the exceptions where the activity sought to be accepted  
14 from the stay or stayed would so interfere with the debtor's  
15 reorganization that it would be inappropriate to let it  
16 proceed. Those cases are out there and the treatises reach  
17 those conclusions in some strong and sweeping language.

18 So that is where I think we come out as for today.  
19 I'll schedule an adjourn date on the time frame that you think  
20 makes sense to revisit any issues we need to revisit. I think  
21 we have a good track record in this case of determining the  
22 matters that need to be determined, and while you still  
23 disagree on what your positions would be, nevertheless moving  
24 forward so the city can do the work that is its charge, and

1 the debtor can get to work on the business of reorganizing --  
2 continue the hard work of reorganizing in Chapter 11.

3                   Are there any other matters on the Court's calendar  
4 today that require prompt attention?

5                   MR. KUSHNER: Cash collateral, your Honor.

6                   THE COURT: Well, there we are. All right. As for  
7 cash collateral.

8                   MR. KUSHNER: Counsel and I have exchanged a form of  
9 what is going to be called the second interim cash collateral  
10 order. I have some minor comments to the document. The issue  
11 is agreeing on the budget, and as I represented to the Court  
12 before, the debtor banks at Metropolitan National Bank, has  
13 established its DIP account, so in effect has been operating  
14 under a de facto cash collateral situation where basically  
15 every check is screened and what have you, and there's a  
16 dialogue going between the business people.

17                  Both my client and Mr. Davis and I wish to formalize  
18 the agreement, and we will endeavor to do so in the next day  
19 or two when we both have a chance to dot the I's and cross the  
20 T's on the second interim stipulation and order.

21                  MR. DAVIS: Your Honor, Wayne Davis. I generally  
22 confirm what Mr. Kushner has just said with a bit more  
23 specificity. Some of the discussions that we have had I think  
24 are going to be assisted by the bank's ability as of today to

1 review the operating reports that were filed --

2 THE COURT: I'm sure that will be helpful.

3 MR. DAVIS: -- as to that detail, but I do want to  
4 note that there is an issue that is touched on in the  
5 operating reports I've already seen, and we'll look further as  
6 to certain compensation amounts that are being paid to certain  
7 individuals associated with the debtor.

8 THE COURT: Okay.

9 MR. DAVIS: It is of significant concern to the  
10 bank, and it is going to be an issue that I will be discussing  
11 with Mr. Kushner, the bank will be discussing with the debtor  
12 perhaps, and hopefully we can reach a consensual resolution  
13 without needing to come back to your Honor to make a  
14 particular point.

15 THE COURT: As for today we do continue to carry the  
16 motion to use cash collateral. It sounds like I should be  
17 looking for some kind of a writing in the form of a  
18 stipulation to be submitted by the parties?

19 MR. KUSHNER: Yes. We submitted an initial order  
20 which your Honor approved.

21 THE COURT: Yes.

22 MR. KUSHNER: There are some, you know, updated  
23 changes to it, but I did review it, what Mr. Davis prepared,  
24 and it's in a form that's reasonably acceptable to me, so that

1 should hit you -- hit your chambers before the end of the  
2 week.

3 THE COURT: All right. So I'll note the appearances  
4 indicate that you'll be submitting a stipulation as reflected  
5 in the record and we'll have an adjourn date.

6 MR. CURTIN: Excuse me, your Honor. I'd like to see  
7 a copy of the --

8 THE COURT: Of course. Mr. Kushner, it goes without  
9 saying, but I'm glad Mr. Curtin said it, that you'll be  
10 running that by his office as well.

11 MR. KUSHNER: Yes.

12 THE COURT: All right.

13 MR. KUSHNER: For housekeeping purposes, your Honor  
14 --

15 THE COURT: Yes.

16 MR. KUSHNER: -- number 54, the motion to pay, I  
17 think that that was resolved.

18 THE COURT: I was going to ask you the same. Can I  
19 mark that off the calendar?

20 MR. KUSHNER: Yes.

21 THE COURT: That will be so ordered.

22 MR. KUSHNER: It's supposed to be marked off without  
23 prejudice to Mr. Noe's right to renew his request for  
24 compensation pre-petition I believe, which was not approved in

1 the course of these proceedings, but it's without prejudice to  
2 his right.

3 THE COURT: Indicated marked off without prejudice,  
4 which is the broadest statement we can make.

5 MR. KUSHNER: And there was a snafu, your Honor, on  
6 number 56.

7 THE COURT: Yes.

8 MR. KUSHNER: So I'd like to clear that up now.  
9 Previously you entertained the debtor's application to retain  
10 Goetz Fitzpatrick as Chapter 11 counsel. There were a number  
11 of objections that were raised primarily on the basis of  
12 either a perceived or actual conflict due to our  
13 representation of various landlords.

14 A record was made on October 25th granting the  
15 application subject to our firm withdrawing as counsel for  
16 each of the landlord indemnitee parties in the 1983 action  
17 I'll call that in the district court, and also in the  
18 adversary proceeding that was filed before you, which  
19 technically it was the vehicle by which the automatic stay  
20 motion was just heard.

21 So you granted that motion. I settled an order.  
22 Both the city and the bank had comments to it. I made changes  
23 to the bank's version. I could not agree with the city's  
24 comments. So I served by notice of presentment the copy of

1 the order that I thought I had agreed to with the city, but we  
2 picked the wrong form. There were so many machinations of the  
3 stipulation and order, and the city pointed that out to me.  
4 So we resubmitted it, but not through the docket. We  
5 resubmitted it through Ms. Jackson at her request. It is in  
6 the form and content that the bank has agreed to. I'll let  
7 the city speak for itself as to what its objection, although  
8 none was filed in time to the order, but I'm sure the Court's  
9 going to hear the city on this.

10 THE COURT: We'll do something sensible. I'm  
11 looking at number 56 on the docket, which is described in part  
12 as hearing re: application to employ filed by debtor, notice  
13 of submission of proposed order, objection filed by creditor,  
14 City of New York. So I take it this is --

15 MR. KUSHNER: The form of order that was attached to  
16 the notice of presentment was a stale order. The city -- the  
17 bank pointed that out. So the Court -- I wouldn't have let  
18 the Court sign that order. It was not agreed to between the  
19 bank and myself, and since we could not reach an agreement  
20 with the city, although the debtor did reach one with the  
21 bank, we served -- we re-served and we didn't refile because  
22 we were told not to refile it. I believe Ms. Jackson has the  
23 form of the order that was sent to her by e-mail the other  
24 day. I can hand up a copy. I'll let Mr. Davis look at it.

1                   MR. DAVIS: Let me take a quick look, your Honor,  
2 but if I may just note we speak prior to taking a quick look.

3                   THE COURT: Please.

4                   MR. DAVIS: What happened is we did object for  
5 exactly the reasons that Mr. Kushner has said. The order that  
6 had been submitted was not the form of order we had agreed to.  
7 As Mr. Kushner has further said, and subject to my reviewing  
8 this and confirming, I am sure it will be the case or I assume  
9 it will be the case that the order that was submitted to Ms.  
10 Jackson is the order that we had agreed to.

11                  The form of agreed order has not yet, and I checked  
12 this morning, hit the docket. So there's some confusion  
13 because the parties I think to my left and right have yet to  
14 see the order in the form that's now been submitted for your  
15 signature.

16                  THE COURT: And this is the retention of counsel  
17 order?

18                  MR. KUSHNER: Yes.

19                  THE COURT: I'd like it to be seen by all relevant  
20 parties and submitting showing the submitted, showing the sign  
21 off of the parties. Doesn't that make sense?

22                  MR. KUSHNER: Yes. I have only copy though. I can  
23 do it another day.

24                  THE COURT: We need it submitted electronically.

1                   MR. KUSHNER: Yes. We didn't submit it -- resubmit  
2 it electronically because we were told not to, and --

3                   THE COURT: I think what you should do is submit to  
4 the e-order box. I take it to the objections to the retention  
5 have been --

6                   MR. KUSHNER: Resolved.

7                   THE COURT: -- resolved.

8                   MR. KUSHNER: Yes.

9                   THE COURT: So the application is granted without  
10 opposition. Please submit a proposed order showing the  
11 consent as -- showing the consent of all parties.

12                  MR. KUSHNER: We already --

13                  MR. KLEINMAN: Your Honor, I'm not sure -- I'm now  
14 completely confused as to --

15                  THE COURT: That's why I'm asking for the order to  
16 be resubmitted showing -- to the e-order box, not the ECF  
17 docket, showing the consent of all parties.

18                  MR. KLEINMAN: Okay, but the city has two issues  
19 here, and maybe the first is technical, but at least I -- so  
20 the -- I think the conversation the last time here was that  
21 with respect to representation of the landlords in both the  
22 adversary and the 1983 that I guess the Court was looking for  
23 counsel for the landlords to come forward and be substituted  
24 in those actions.

1           I don't know what's happened in the adversary with  
2 respect to that. My understanding with respect to the 1983 is  
3 that there has been no substitution, and until that happens  
4 Goetz Fitzpatrick is counsel of record in the 1893.

5           THE COURT: And that's at the district court?

6           MR. KLEINMAN: And that's in the district court, and  
7 as to that the conflict remains until such time as the  
8 district court either substitutes counsel or approves their  
9 withdrawal. So that's an event not within this Court's  
10 control, and has yet to happen.

11           THE COURT: Nor in counsel's control.

12           Mr. Kushner, I think everyone wants this done, but  
13 if your firm is still in a conflicting representation in the  
14 district court, then maybe it's not as simple as it seemed.

15           MR. KUSHNER: The 1983 action in district court has  
16 been held in abeyance. The court is just waiting on a status  
17 report. That I found out from my partner, who's handling --  
18 who was formerly handling it.

19           The landlords, as best as I know, are attempting to  
20 locate a single counsel. It may be possible that Mr. Dal  
21 Lago, who's here today, may be that attorney who represents  
22 all of the landlords. He does represent one now, you know, in  
23 other general matters.

24           So we are not doing any work on the 1983 action. I

1 understand Mr. Kleinman's point, but I think that the court --  
2 the district court is awaiting our order of retention here to  
3 be shown to them that we cannot do -- simultaneously proceed  
4 with the representation of the debtor and with any of the  
5 indemnitees.

6                   THE COURT: So what if there's a docket entry  
7 substantially as follows: That this motion to retain counsel  
8 is granted as reflected in the record, and that the debtor  
9 will submit an order on consent confirming that debtor's  
10 counsel does not represent any landlords, any parties -- well,  
11 landlords I guess in the context of this case is sufficiently  
12 specific, in this or any other proceeding, including -- what  
13 is the name of the case in the district court?

14                   MR. KUSHNER: It's the same landlords that are in  
15 the adversary proceeding, your Honor.

16                   MR. KLEINMAN: Your Honor, it's 203 17th Realty, LLC  
17 versus City of New York. The docket number --

18                   THE COURT: Just one second.

19                   MR. KLEINMAN: I'm sorry.

20                   THE COURT: 203 --

21                   MR. KLEINMAN: 17th --

22                   THE COURT: -- 17th --

23                   MR. KLEINMAN: -- Realty, LLC.

24                   THE COURT: Versus?

1 MR. KLEINMAN: Versus the city.

2 THE COURT: City of New York.

3 MR. KLEINMAN: Right, with the docket number of 11-  
4 CV-1392, and as --

5 THE COURT: 11-CV-1392. What are the initials?

6 MR. KLEINMAN: CBA ALC.

7 THE COURT: CBA ALC. All right. The debtor to  
8 submit order on consent confirming the debtor's counsel does  
9 not represent any landlords in this or any other proceeding,  
10 including in 203 dash 17th or 203 space 17th?

11 MR. KLEINMAN: I think it's space.

12 THE COURT: Space 17th Realty, LLC versus City of  
13 New York, 11-CV-1392 (CBA)(ALC). I think that will give Chief  
14 Judge Amon a sense of what's happening, what needs to happen.  
15 Once I see that order with that representation in it, as well  
16 as everything else that should be in the retention order, I'll  
17 be in a good position to proceed, but hopefully that will  
18 break the logjam. We're waiting for something there. They're  
19 waiting for something here. We will never cross this bridge  
20 definitively without some kind of clarification.

21 MR. KLEINMAN: And then the other issue with respect  
22 -- and again, I have no idea what the current order is, but  
23 the issue of the debtor agreeing, which was discussed at the  
24 courtroom last time here, the debtor agreeing not to fund that

1 litigation, which raises similar kinds of conflict issues, and  
2 I understood that was agreed to by the debtor's counsel in  
3 open Court, and the last version of the order I saw did not  
4 have -- Mr. Davis put it in and it was taken out.

5 THE COURT: Is that a retention issue or a cash  
6 collateral issue? I don't see that as a -- I'm not -- it's  
7 not clear to me that that's a retention issue.

8 MR. KLEINMAN: Well, it was discussed in the context  
9 of the retention motion. It was agreed to by --

10 MR. KUSHNER: No, it was not.

11 THE COURT: For better or worse, we broadly  
12 conference all the issues in a Chapter 11 case when we have  
13 these kinds of omnibus hearings. To me I have to say I don't  
14 see it as necessarily -- I see it as a significant potential  
15 issue in cash collateral. I see it as an issue in the good  
16 administration of this case. If I see in an operating report  
17 that a debtor is using its scarce funds to pay for litigation  
18 for other parties, I think that would raise quite a concern,  
19 at least quite a potential concern.

20 MR. KUSHNER: Your Honor's memory --

21 THE COURT: I'm not sure that it --

22 MR. KUSHNER: -- is not faulty. That's exactly what  
23 the bank had objected to, that it was not prepared to fund  
24 that litigation, so that in the context of the order that the

1 bank and the debtor have consented to, the words that the  
2 debtor will not use Metropolitan National Bank's cash  
3 collateral, was placed in the order.

4           The city would not agree to that, and I presume  
5 based upon what Mr. Kleinman just said, they're not going to  
6 agree to it. So that was the language that was agreed to by  
7 the bank that was the way that we resolved the bank's  
8 objection to the retention issue.

9           That was before the Court. That was argued on a  
10 record, and that was the way it was resolved, and that's what  
11 the order said.

12           THE COURT: An order?

13           MR. KUSHNER: The proposed order that we sent to Ms.  
14 Jackson.

15           THE COURT: I understand. All right. Well, the  
16 other issue I think is very much a retention issue, and I  
17 think this may be a way to resolve it. I'll say I anticipate  
18 that this is a way to resolve it.

19           I'd like to go back to the beginning of the number  
20 of matters. We have a pretrial in OTR versus City of New  
21 York, and I suspect that at some point down the road the  
22 issues that we are attending to in the context of stay relief  
23 will overlap substantially with the issues that are presented  
24 in the adversary proceeding. I think as for today we should

1 carry this pretrial conference to our adjourn, whatever that  
2 proves to be.

3 MR. KUSHNER: Plus those folks don't have an  
4 attorney at this point.

5 THE COURT: Plus those folks don't have an attorney  
6 at this point. Well, there is that, except OTR Media Group is  
7 the lead plaintiff.

8 MR. KUSHNER: I understand, and I agree with what  
9 your Honor stated as to us, but the stipulation in effect  
10 doesn't include the debtor. It only includes the landlord  
11 indemnitees. The debtor was specifically left out of that.

12 THE COURT: All right. With respect to number 50 on  
13 the calendar, the adjourned hearing and the proposed -- the  
14 entry of the proposed order, can you mark this off the  
15 calendar? It seems to me perhaps --

16 MR. KUSHNER: Number 50?

17 THE COURT: Yes. A hearing on the entry of the  
18 proposed order.

19 MR. KUSHNER: That was resolved by the stipulation.

20 THE COURT: I think so. Marked off and so ordered.

21 MR. KLEINMAN: No. Your Honor, I disagree with  
22 respect to that. We also have a motion to vacate the  
23 stipulation and order, and we have briefed with respect to the  
24 preliminary injunction. All we entered into, and I regret it

1 now a great deal, all we entered into was in lieu of TRO  
2 relief was the stipulation and order.

3 THE COURT: And your motion will be carried, not  
4 marked off. Your motion is number 52 on the calendar, and I  
5 intend to carry that.

6 MR. KLEINMAN: But we're talking about motion 50.

7 THE COURT: It's not a motion. It's a hearing on  
8 the entry of a proposed order with respect to a motion made by  
9 OTR. This is a very technical and exceptionally precise  
10 point, but when I look at a calendar with a number of items on  
11 it, I can tell you that the substantive issues that I see and  
12 that you're raising comes up in the context of your motion.  
13 You are correct, which is number 52 on the calendar, number 16  
14 on the docket, the adjourned motion to vacate the stipulation  
15 and order.

16 So those issues are preserved. They are there. I  
17 appreciate the context and I recall the background from late -  
18 - even going back to late August.

19 MR. KLEINMAN: Well, I --

20 THE COURT: But with respect to a hearing on the  
21 entry of a proposed order, the entry of which is no longer  
22 being pursued, I -- that hearing which was calendared for  
23 administrative reasons, but is not the product of a party's  
24 motion. Ms. Jackson, am I right? It can be marked off the

1 calendar.

2                   Absolutely no right whatsoever of the city is  
3 compromised in that regard because your motion is at number 52  
4 on the calendar.

5                   MR. KLEINMAN: Okay.

6                   THE COURT: Keep looking down, you'll see. It's  
7 simply a question of simplifying our dockets so we can focus  
8 on everything we need to, and on the merits issues such as  
9 your motion, for example.

10                  Okay. With respect to number 51 I'll note your  
11 appearances. This motion is granted in part as reflected in  
12 the record. You'll submit a proposed order on consent and  
13 we'll have an adjourn date.

14                  With respect to the adjourned motion to vacate the  
15 stipulation, of which we just spoke, this is that September  
16 2nd stipulation, we'll have an adjourn date.

17                  MR. KLEINMAN: I'm sorry. Your Honor, with respect  
18 to motion 51, so would you like the city to submit a proposed  
19 order or --

20                  THE COURT: I'm carrying it to our next date. This  
21 is the motion to vacate the stipulation and order.

22                  MR. KLEINMAN: I'm sorry, but with respect to the  
23 thing that we spent most of the time today with respect to the  
24 applicability of the automatic stay --

1                   THE COURT: Yes.

2                   MR. KLEINMAN: -- or the exception --

3                   THE COURT: Would you submit a proposed order on  
4 consent? Are you able to do that?

5                   MR. KLEINMAN: Yes.

6                   THE COURT: Thank you.

7                   MR. KUSHNER: On consent and --

8                   THE COURT: And then granted in part and then  
9 adjourned in part. We'll have an adjourn date for all the  
10 rest.

11                  MR. KUSHNER: Okay, but the consent would be the  
12 debtor, anybody -- any other party in interest or just the  
13 debtor?

14                  THE COURT: I think this is a matter -- it seems to  
15 me this is a matter between the debtor and the city. If  
16 another party would like to have an opportunity in the  
17 interest of a good process, I'll encourage you to circulate  
18 this to the bank if they'd like to be aware of what's being  
19 done.

20                  MR. KUSHNER: Your Honor --

21                  THE COURT: I want to see the consent of the two  
22 parties.

23                  MR. KLEINMAN: Thank you, your Honor. We will.

24                  MR. KUSHNER: Your Honor, just as a housekeeping

1 measure on 51, I'm not sure that that was ever -- was that  
2 ever filed in the main case or was it only filed in the  
3 adversary?

4 THE COURT: Only filed in the adversary as far as  
5 I'm aware.

6 MR. KUSHNER: So I think that it would be a  
7 suggestion that perhaps the city should refile it in the main  
8 case because there are other parties in interest that are  
9 effected by --

10 THE COURT: The notice point is a fair one, and I  
11 thought about where we should be entering the order. Motion  
12 for relief from the automatic stay for the world to see it in  
13 this case should be on the Chapter 11 case docket.

14 MR. KLEINMAN: Okay. So we have just paid the fee  
15 for the vacate stay motion, so I don't know how it would work  
16 administratively. Can we simply --

17 THE COURT: You could follow up with the clerk's  
18 office or my courtroom deputy. This is beyond my --

19 MR. KLEINMAN: Okay. And beyond mine too.

20 THE COURT: -- specific knowledge, perhaps yours as  
21 well, but we'll get it sorted out --

22 MR. KLEINMAN: Okay. We'll do that.

23 THE COURT: -- one way or another, and tomorrow will  
24 be soon enough.

1           All right. But I do think the point is well taken.  
2 That order should be entered not only in the adversary, but  
3 somehow also on the -- we'll figure it out. We'll figure out  
4 an appropriate solution, and you'll be informed by my  
5 courtroom deputy or perhaps you'll even suggest it to us.

6           All right. Cash collateral, we're going to carry  
7 that to our next hearing date, and you'll be submitting a  
8 stipulation to be so ordered as reflected in the record.

9           With respect to the adjourned motion to pay, marked  
10 off without prejudice as reflected in the record.

11           With respect to the status conference, Chapter 11  
12 status conference, I have an adjourn date.

13           Application to employ, granted as reflected in the  
14 record. Debtor to submit order on consent confirming that  
15 debtor's counsel does not represent any landlords in this or  
16 any other proceeding including in 203 17th Realty, LLC versus  
17 City of New York, 11-CV-1392, CBA ALC.

18           Application to enjoy -- enjoy -- to employ various  
19 professionals as attorneys and accountants.

20           MR. KUSHNER: Okay. That was the matter that Mr.  
21 Curtin had contacted me requesting an adjournment, which I of  
22 course agreed to because he did not have the operating  
23 reports.

24           THE COURT: Okay.

1                   MR. KUSHNER: I do want to bring to the Court's  
2 attention a conversation that I had with Mr. Curtin involving  
3 an appeal that is before the First Department on that Young  
4 case, which is 840 --

5                   MR. HOLZER: 838 Sixth Avenue.

6                   MR. KUSHNER: 838 Sixth Avenue.

7                   MR. HOLZER: To be precise, it's not -- it's before  
8 the First Department. It's not really an appeal by -- it's an  
9 appeal of the ADJ decision. It's not an appeal from the  
10 Supreme Court decision.

11                  MR. KUSHNER: The point is one of the professionals  
12 in the application, Howard Crystal, needs to perfect whatever  
13 he needs to perfect by December 15th. As indicated, he would  
14 not perform any work or appear on behalf of the debtor because  
15 he hasn't been authorized to represent the debtor.

16                  THE COURT: He's not retained?

17                  MR. KUSHNER: That's right, and you understand the  
18 concerns as we all do, so if Mr. Curtin and I can't resolve  
19 the issue in a couple of days I'm going to get an application  
20 to retain Mr. Crystal in the more conventional way, and do  
21 that hopefully on an expedited basis supported by the  
22 appropriate affidavits and what have you. I don't think there  
23 will be a problem with him being retained as special counsel,  
24 so that he has enough time to do whatever he needs to do by

1 the 15th.

2 THE COURT: Interesting.

3 MR. KUSHNER: I'm told that the City of New York  
4 won't consent to another extension. Maybe they'll reconsider  
5 that request, and even if they do consent it's not a surety  
6 by the First Department anyway, so --

7 THE COURT: Mr. Curtin.

8 MR. CURTIN: Your Honor, William Curtin for the  
9 United States Trustee. Here's what I agreed to. First of  
10 all, it's not something that Mr. Kushner and I can work out.  
11 There have been other objections. We may have an objection.  
12 I don't know. I have to look at the operating reports, but  
13 what I am requesting, as I indicated in the letter and as the  
14 debtor consented to, is an adjourn date on the motion.

15 With regard to the time sensitive nature of the  
16 retention, what I indicated as a solution was that any  
17 professional that felt they needed retention sooner could  
18 apply under normal retention process, and then I would give  
19 those applications a quick review.

20 THE COURT: Understood.

21 MR. CURTIN: Reserving all rights, obviously, to  
22 object to those applications if there's anything objectionable  
23 in them, but I will look at them quickly, understanding the  
24 time sensitive nature, but as far as the ordinary course

1 professional motion per se, I am still requesting that that be  
2 adjourned because again it's not --

3 THE COURT: That makes sense.

4 MR. CURTIN: -- just between us and the debtor.

5 MR. KUSHNER: And the debtor's in agreement with  
6 that.

7 THE COURT: That's fine. Anyone else like to be  
8 heard on this? It sounds like we're looking for an adjourn  
9 date. Do we have any other dates on the calendar in this case  
10 presently?

11 MR. KUSHNER: I have the December 15th at 2:30 for  
12 the exclusivity motion and the time to extend.

13 THE COURT: So we'll carry everything to that date  
14 for case management and housekeeping purposes, see what we  
15 need to do then. December 15th at 2:30.

16 MR. KUSHNER: Yes.

17 THE COURT: All right.

18 MR. KUSHNER: I also have a number of other matters  
19 on that day. I don't know if the Court's -- I have the Azuka  
20 (ph.) matters and I think SK New York, so at 2:30 I believe.  
21 So I think the Court should have enough time.

22 THE COURT: Hope so. That's what's on the calendar,  
23 and that should work fine. Okay. All right.

24 Thank you very much. Interesting issues, very well

1 briefed, very productively argued. This was -- I suppose  
2 every aspect of this job is a pleasure, but this was a  
3 pleasure. Thank you so much. We'll be looking for your  
4 orders.

5 THE CLERK: All rise.

6

7 \* \* \*

8 **CERTIFICATION**

9

10 I, Catherine Aldrich, certify that the foregoing is a correct  
11 transcript from the electronic sound recordings of the  
12 proceedings in the above-entitled matter.

13

*Catherine Aldrich*

14

December 9, 2011

15

Catherine Aldrich